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Supreme Court, U.S.
FILED
DEC 17 1993
OFFICE OF THE CLERK

No. 93-806

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

REYNOLDS K. OHAI,
Petitioner,
vs.
COMMUNITY DEVELOPMENT COMMISSION OF THE CITY OF SANTA FE SPRINGS, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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45 pp

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RESPONDENTS' BRIEF IN OPPOSITION

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Respondents COMMUNITY DEVELOPMENT COMMISSION OF THE CITY OF SANTA FE SPRINGS and CITY OF SANTA FE SPRINGS (hereafter "Respondents") respectfully request denial of the petition for certiorari filed herein by petitioner REYNOLDS K. OHAI (hereafter "Petitioner").

OPENING SUMMARY OF ARGUMENT

Petitioner asks this Court to review a unanimous, unpublished decision of the California Court of Appeal. The decision affirms a trial court order which dismissed Petitioner's inverse condemnation suit at the pleadings stage.

In the Court of Appeal, Petitioner argued that his pleadings state a cause of action for monetary damages arising from a temporary regulatory taking of his land. The Court of Appeal rejected that argument in a written opinion. As the opinion explains, Petitioner's pleadings contain only one allegation of government action that deprived him of substantially all use of his land, but that allegation is an obvious sham.

Petitioner asserts that California's disposition of his case raises issues under the Fifth and Fourteenth Amendments to the federal Constitution. On that basis, he now petitions this Court for certiorari. There are a variety of reasons why his petition should be denied.

First, it fails to comply with this Court's rules governing the contents of such petitions. It lacks any discussion as to why certiorari is appropriate given the criteria set forth in this Court's Rule 10.1. Pages 7–8 of this brief, *post*. The petition also omits the required showing that Petitioner raised federal questions at some stage of the California appellate process. Pages 8–9 of this brief, *post*.

In addition to being procedurally flawed, the petition is substantively unmeritorious in every respect. For example, there is no validity to Petitioner's claim that the disposition of his suit conflicts with this Court's decision in *First Lutheran Church* v. *Los Angeles County*, 482 U.S. 304 (1987) (*First English I*). Instead, the two cases are readily distinguishable. In *First English I*, this Court granted certiorari because the Court of Appeal rejected a landowner's "temporary taking" theory of monetary damages *without first considering whether a regulatory taking had occurred.* In the present case, however, the Court of Appeal did not dispose of Petitioner's suit until *after* it expressly determined that there was no regulatory taking of Petitioner's land. Pages 10–12 of this brief, *post*.

Petitioner challenges the Court of Appeal's determination that no regulatory taking occurred. He admits, however, that this determination resulted from the insufficiency of his allegations under California's "technical" rules of pleading. The Court of Appeal's determination thus fails to present any federal question, because it involves only matters of state pleading practice. Page 13 of this brief, *post*. Similarly, no federal question is implicated by Petitioner's contention that the California courts failed to follow their own pleading rules when evaluating his case. Page 13 of this brief, *post*.

Petitioner also attacks the California rules of pleading themselves. This attack presents no unsettled federal questions, though. It is well established that a takings suit can be dismissed at the pleadings stage without offending either the Fifth or Fourteenth Amendments. Pages 14–17 of this brief, *post*. The petition also fails to show that California courts deprived Petitioner of any federally protected right when they denied him leave to amend his pleadings for a third time. Pages 18–21 of this brief, *post*. And no federal question arises from California courts' refusal to accept the truth of Petitioner's sham allegations. Pages 21–23 of this brief, *post*.

The Petition fails to demonstrate any conflict between California takings jurisprudence and that of other jurisdictions such as South Carolina and the Ninth Circuit. Pages 23–28 of this brief, *post*. The instant case thus provides no vehicle for addressing Petitioner's arguments that such conflict would contravene the Equal Protection Clause and lead to undesirable forum shopping. Page 28 of this brief, *post*.

Granting certiorari would be inappropriate even if the petition did raise an unsettled federal question. At most, the proper disposition would be a remand to the Court of Appeal, so that it can determine whether to dispose of Petitioner's suit on alternative state grounds which the trial court employed to dismiss the case. Page 29, *post*.

STATEMENT OF THE CASE

Respondents are a California city and its community development commission. Petitioner owns land in the city. Pet. for Cert. 3–5; App. to Pet. for Cert. 1, 3, 11, 47–48.

In 1973, Respondents adopted a redevelopment plan for the part of town where Petitioner's property is located. Respondents later amended the plan twice. As amended, *the plan neither restricted, diminished nor in any way limited the uses which Petitioner could lawfully make of his land.* Pet. for Cert. 2–5; App. to Pet. for Cert. 11, 48, 101–11.

The amended redevelopment plan announced that Gardner Avenue (a street adjoining Petitioner's land) was *intended* to be vacated at some unspecified future date. That date has yet to come, though: Gardner Avenue remains an open thoroughfare even to this day, albeit in a poorly maintained condition. Pet. for Cert. 3–6, 13, 16–18, 22; App. to Pet. for Cert. 4, 12, 34–35, 37–38.

The most recent amendment to the redevelopment plan occurred in 1976. Nearly a dozen years later, Petitioner filed this suit against Respondents. Pet. for Cert. 2, 7; App. to Pet. for Cert. 11–12, 48, 101.

In his initial pleading, Petitioner alleged that Respondents had taken his land, without compensation, by their act of vacating Gardner Avenue "on paper." In that same pleading, however, Petitioner also alleged that Respondents had taken " . . . no action to officially close Gardner Avenue, which is still a public street which fronts the subject property . . . ." Petitioner verified that pleading, i.e., he affirmed the truth of its allegations under penalty of perjury. Pet. for Cert. 7–8, 17–18; App. to Pet. for Cert. 11–12, text & n. 2.

Respondents demurred to Petitioner's original pleading. The trial court sustained that demurrer with leave to amend. Pet. for Cert. 9.

Petitioner then submitted a first amended complaint. Like its predecessor, it alleged that Respondents had taken " . . . no action to officially close Gardner Avenue, which is still a public street which fronts the subject property . . . ." Pet. for Cert. 9, 18–19; App. to Pet. for Cert. 11–12, text & n. 2.

Respondents again demurred. The trial court sustained that demurrer, again with leave to amend, on the ground that the first amended complaint failed to state a cause of action. Pet. for Cert. 9–10.

Two years later, Petitioner filed a second amended complaint. This time he tried a different tack. He alleged that he " . . . was informed and believes that Gardner Avenue was officially closed and abandoned by [Respondents] . . . , which action had the effect of landlocking [his] property." Pet. for Cert. 11, 20–21; App. to Pet. for Cert. 11.

Respondents again demurred. The trial court sustained that demurrer as well. The trial court reasoned that Petitioner's second amended complaint was barred by (1) admissions in his prior pleadings, (2) the statute of limitations, (3) a failure to exhaust administrative remedies, and (4) principles of res judicata. Pet. for Cert. 11–12; App. to Pet. for Cert. 24, 33–34, 40.

This time the trial court denied leave to amend and dismissed the case. Petitioner appealed. Pet. for Cert. 12; App. to Pet. for Cert. 9, 14–15, 41.

The Court of Appeal undertook a de novo review of Petitioner's second amended complaint. In so doing, it applied the long settled rule which California appellate courts use in reviewing suits dismissed at the pleading stage. Specifically, the Court of Appeal assumed the truth of all properly pleaded material facts in Petitioner's second amended complaint. App. to Pet. for Cert. 9.

The Court of Appeal invoked a California exception to this rule, though. The exception is designed to prevent sham pleading. It applies when a litigant files an amended pleading which directly and inexplicably contradicts allegations in an earlier pleading. In such a case, the reviewing court takes the prior pleading's allegations into consideration when ruling on a demurrer to the amended pleading. App. to Pet. for Cert. 11–12.

The Court of Appeal applied that exception as follows: Petitioner's original and first amended pleadings *both* alleged that Gardner Avenue had *never* been closed. On the other hand, his second amended complaint *did* allege the closure of Gardner Avenue. Because Petitioner failed to explain the inconsistency, the Court of Appeal disregarded the second amended complaint's unexplained allegation that Gardner Avenue was closed. App. to Pet. for Cert. 12.

Stripped of that sham allegation, the second amended complaint failed to allege any government action which deprived Petitioner of substantially all use of his property. The Court of Appeal accordingly held that Petitioner had failed to plead a cause of action for inverse condemnation. On that basis, the Court of Appeal upheld the trial court's decision to sustain Respondents' demurrer. App. to Pet. for Cert. 10, 12–13.

The Court of Appeal next considered whether the trial court had erred in denying Petitioner leave to file a third amended pleading. Under well settled rules of California appellate procedure, the burden of showing such error is on the pleader. To meet his burden, the pleader must explain, at some point prior to oral argument on appeal, how his complaint can be amended to state a cause of action. Because Petitioner *never* offered such an explanation, in either the trial or appellate court, the Court of Appeal affirmed the trial court's denial of leave to amend. App. to Pet. for Cert. 10, 13–14.

California's seven-member Supreme Court unanimously denied Petitioner's request for discretionary review. Pet. for Cert. 2; App. to Pet. for Cert. 7. The instant petition for certiorari followed. Via this suit, Petitioner evidently hopes to lever a settlement wherein Respondents' taxpayers will assume the cost of (1) testing his land for toxic waste, and (2) installing off-site improvements for his property's benefit. Pet. for Cert. 10–11.

ARGUMENT

I. *The Petition Should Be Denied For Failure To Comply With This Court's Rules.*

A. *The Petition Fails To Discuss Why Certiorari Should Be Granted Pursuant To The Reasons In Rule 10.1.*

Under this Court's Rule 14.1(j), a certiorari petition must include direct and concise argument explaining why a case fits the Rule 10.1 criteria for granting certiorari.

Despite these rules, the petition in the instant litigation rambles at length without ever mentioning even one of the Rule 10.1 criteria. The petition can and should be denied on this basis alone. U.S.Sup.Ct. Rule 14.5; see, *e.g.*, *Glick Brothers Lumber Co.* v. *Bowles, Price Administrator*, 325 U.S. 877, rehearing denied, 326 U.S. 804 (1945); *Kennemer* v. *Billington*, 323 U.S. 709 (1944).

B. *The Petition Fails To Show Proper Presentation Of Any Federal Question In The State Court System.*

In reviewing state court judgments, this Court, with very rare exceptions, has refused to consider claims that were neither raised nor addressed in the state court system. *Yee* v. *Escondido*, 503 U.S. __, __, 112 S.Ct. 1522, 1531, 118 L.Ed.2d 153, 168–69 (1992). To guard against improvident grants of certiorari, this Court's Rule 14.1(h) therefore requires state court certiorari petitions to specify when and how the pertinent federal questions were presented in the state appellate courts.

The petition in the present case disregards this rule altogether. At no point in his lengthy petition or voluminous appendix does Petitioner indicate raising any federal claims before the California Court of Appeal. This omission by itself is sufficient reason to deny certiorari. See *Lynum* v. *Illinois*, 368 U.S. 908, 909, 912 (1961) (FRANKFURTER, J., dissenting).

Significantly, the Court of Appeal *never* addressed *any* federal questions, App. to Pet. for Cert. 9–14, as Petitioner himself acknowledges. Pet. for Cert. 12. Petitioner also states that the trial court dismissed his suit without ruling on any federal questions. Pet. for Cert. 11.

When a state appellate court fails to pass upon a federal question, it is assumed, absent a contrary showing, that the failure was due to want of proper presentation in the state courts. *Webb* v. *Webb*, 451 U.S. 493, 496–97 (1981). In such circumstances, this Court ordinarily refuses to consider the federal claim, even if it was presented in the trial court, *Hiawassee Power Co.* v. *Carolina-Tenn. Co.*, 252 U.S. 341, 343–44 (1919), or asserted in an unsuccessful state supreme court petition for discretionary review. *Yee* v. *Escondido*, *supra*, 503 U.S., at __, 112 S.Ct., at 1531, 118 L.Ed.2d, at 168–69.

It should be noted that Petitioner neglected to assert most of his "federal" claims at *any* stage of the California court proceedings. For example, he *never* claimed in state court that California's rules of pleading are unconstitutional, or that they are so hopelessly in conflict with other jurisdictions' rules as to pose an Equal Protection issue.

The petition should accordingly be denied for failing to show proper presentation of any federal question in the state court system.

II. *The Petition Should Be Denied, Because This Case Does Not Satisfy Any Of The Criteria For Granting Certiorari.*

This Court lacks jurisdiction to review a state court decision unless it necessarily presents a federal question. 28 U.S.C. § 1257(a); *Mental Hygiene Dept.* v. *Kirchner*, 380 U.S. 194, 197 (1965). Even when a federal issue is involved. this Court will deny certiorari, unless the issue is either (1) a *particularly important* but *unsettled* question, or (2) one that has divided lower courts. U.S.Sup.Ct. Rule

10.1; *Yee* v. *Escondido*, *supra*, 503 U.S. __, __, 112 S.Ct. 1522, 1533, 118 L.Ed.2d 153, 170–71; *Rockford Life Ins. Co.* v. *Ill. Dept. of Rev.*, 482 U.S. 182, 184, n. 3 (1987). As explained below, the instant case meets none of the foregoing criteria.

A. *Dismissal of Petitioner's Suit Does Not Conflict With The* First English I *Decision.*

This Court's Rule 10.1(c) authorizes certiorari where a state court has decided a federal question in a way that conflicts with this Court's decisions. In apparent reliance on that rule, Petitioner claims that the Court of Appeal's disposition of his case conflict with this Court's holding in *First English I*, *supra*, 482 U.S. 304. Pet. for Cert. 7–9, 21, 24. Petitioner is mistaken.

In *First English I*, the plaintiff landowner pleaded that a county ordinance had denied it all use of its property. On that basis, the landowner sued the county and its flood control district for monetary damages. 482 U.S., at 308–09.

The trial court entered an order striking the landowner's allegation that it had been denied all use of its property. The California Court of Appeal affirmed that order. Both courts reasoned that such an allegation was immaterial to a cause of action for monetary damages. They reached this conclusion by assuming that the Fifth and Fourteenth Amendments do not require monetary compensation as a remedy for temporary regulatory takings. As a result, the California courts rejected the landowner's inverse condemnation cause of action without even bothering to determine whether the landowner had adequately pleaded a denial of all use of its land. 482 US., at 306–13, 321–22.

The landowner appealed to this Court. At that juncture, the California Court of Appeal had disposed of the landowner's takings claim without considering whether the landowner had pleaded a taking. The landowner's appeal thus came within this Court's jurisdiction by presenting a federal constitutional question, namely, whether the Fifth and Fourteenth Amendments require payment of compensation when a land use regulation temporarily deprives a landowner of all use of his property. 482 U.S., at 306–07, 310–13.

This Court answered that question in the affirmative. It therefore remanded the case to the California Court of Appeal to determine, among other things, whether the challenged ordinance actually denied the landowner all use of its property. 482 U.S., at 306–07, 310–13, 321–22.

In essence, the *First English I* Court held that it was constitutional error to dismiss a temporary regulatory takings claim without first determining whether the challenged regulation denied the landowner all use of its property. The instant case does not share that constitutional vice, however.

In the present case, the Court of Appeal expressly determined that Respondents' regulation has *not* deprived Petitioner of substantially all use of his property. App. to Pet. for Cert. 10–11, 12–13. It is on *that* basis that the Court of Appeal rejected Petitioner's takings claim, *id.*, at 10, 13, *not* out of some misapprehension as to federal constitutional requirements. The Court of Appeal's holding in the present case is therefore distinguishable from, rather than in conflict with, this Court's decision in *First English I*.

It is instructive to examine the subsequent history of the *First English I* case. The California Court of Appeal considered the case on remand in *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 210 Cal.App.3d 1353, 258 Cal.Rptr. 893 (1989), cert. denied, 493 U.S. 1056 (1990) (*First English II*). On that remand, the Court of Appeal specifically reached the question of whether the challenged ordinance denied the landowner all use of its property. The Court of Appeal held that it did *not*. For that reason, the court reaffirmed its original decision dismissing the landowner's inverse condemnation claim. 210 Cal.App.3d, at 1356, 1359–61, 1367–72, 1374, 268 Cal.Rptr., at 894, 896–98, 902–07. The landowner then petitioned for certiorari, and *this Court denied the petition.* 493 U.S. 1056.

Certiorari should likewise be denied in the present case. Like the *First English II* court, the Court of Appeal in the instant case has determined that the challenged regulation does *not* deny Petitioner substantially all use of his property. Because there was *no* taking, the question decided in *First English I*—whether the federal constitution mandates compensation for temporary regulatory takings—simply does not arise. *Agins* v. *Tiburon*, 447 U.S. 255, 263 (1980); cf. *First English I, supra*, 482 U.S., at 311 (distinguishing *Agins, supra*).

There is no conflict whatsoever between the outcome of the present case and *First English I*.

B. *The Dismissal Of Petitioner's Suit Presents No Unsettled Federal Question.*

1. *No Federal Question Is Raised By The Application of California's Pleading Rules To Petitioner's Complaint.*

a. *Dismissal Of A Technically Insufficient Pleading Involves No Federal Question.*

Petitioner appears to attack the Court of Appeal's determination that Respondents never deprived him of substantially all use of his property. He complains that the Court of Appeal should not have reached this determination by requiring " . . . strict compliance with technical rules of pleading . . . ." Pet. for Cert. 22–23.

This presents no federal question. When a state court decides a case on the technical insufficiency of a pleading, that is a state law matter over which this Court lacks jurisdiction. *Commercial Bank* v. *Rochester*, 82 U.S. 639, 642 (1872); *Agins* v. *Tiburon*, *supra*, 447 U.S., at 260, n. 6.

b. *Application Of Local Pleading Rules Is Strictly A Matter Of State Law.*

Petitioner also complains that the California courts misapplied their own pleading rules when deciding his case. Pet. for Cert. 11–16, text & n. 14. This, too, presents a state law matter, as opposed to a federal question over which this Court can exert jurisdiction: This Court must respect the California Court of Appeal's opinion on matters of local pleading law. *MacDonald, Sommer & Frates* v. *Yolo County*, 477 U.S. 340, 352, n. 8, ¶ 1, rehearing denied, 478 U.S. 1035 (1986).

2. *Petitioner's Attack On The Pleading Rules Themselves Presents No Federal Question.*

Petitioner next seems to attack the constitutionality of California's pleading rules themselves. As discussed below, this challenge raises no unsettled federal question.

a. *No Unsettled Federal Question Is Presented By The Rule Permitting Takings Claims To Be Dismissed At The Pleadings Stage.*

i. *It Is Settled That Such A Dismissal Does Not Offend The Takings Clause.*

Petitioner seems to argue that an inverse condemnation suit cannot be dismissed via demurrer to the pleadings without invading rights protected by the Fifth Amendment's Takings Clause. Pet. for Cert. 12, 14, 22–23, 29. This claim fails to present an *unsettled* federal question, though.

Instead, the law is *settled* to the *contrary* of Petitioner's claim. This Court has repeatedly held that a complaint, to invoke the constitutional protection of the Takings Clause, must specifically allege facts showing a deprivation of property without just compensation. See, *e.g.*, *Beaumont, S. L. & W. Ry.* v. *U.S.*, 282 U.S. 74, 88–89 (1930); *Aetna Insurance Co.* v. *Hyde*, 275 U.S. 440, 447–48 (1928); see also *Denver Stock Yard Co.* v. *U.S.*, 304 U.S. 470, 484–85 (1938); cf. *Missouri Pacific R. Co.* v. *Norwood*, 283 U.S. 249, 250, 254–55, 258, modified, 283 U.S. 809 (1931); *Pacific States Co.* v. *White*, 296 U.S. 176, 184–85 (1935).

Indeed, despite Petitioner's belief to the contrary, Pet. for Cert. 14, this Court has frequently affirmed California court judgments that dismissed takings cases via demurrer to the pleadings. See, *e.g.*, *Yee* v. *Escondido*, *supra*, 503 U.S.,

__, __, __, __, 112 S.Ct. 1522, 1526, 1527, 1534, 118 L.Ed.2d 153, 162, 164, 172; *MacDonald, Sommer & Frates* v. *Yolo County, supra*, 477 U.S. 340, 342, 353; *Agins* v. *Tiburon, supra*, 447 U.S. 255, 257, 258, 263.

Numerous lower court decisions recognize that constitutional rights are *not* infringed when an insufficient or defective complaint is dismissed. *Belmar Drive-In Theatre* v. *Hgw. Com.*, 34 Ill.2d 544, 549, 216 N.E.2d 788, 792 (1966); *Deasey* v. *City of Chicago*, 412 Ill. 151, 155, 105 N.E.2d 727, 729 (1952); *Harvey* v. *Brewer*, 166 Ill.App.3d 253, 259, 116 Ill.Dec. 724, 728, 519 N.E.2d 939, 943 (1987); *Harvey* v. *Mackay*, 109 Ill.App.3d 582, 589, 65 Ill.Dec. 167, 172, 440 N.E.2d 1022, 1027 (1982), appeal denied, 92 Ill.2d 574 (1983); *Berlin* v. Nathan, 64 Ill.App.3d 940, 951, 21 Ill.Dec. 682, 690, 381 N.E.2d 1367, 1374 (1978), appeal denied, 72 Ill.2d 581, cert. denied, 444 U.S. 828, rehearing denied, 444 U.S. 974 (1979); *DiSanto* v. *City of Warrenville*, 59 Ill.App.3d 931, 940, 17 Ill.Dec. 289, 295, 376 N.E.2d 288, 294, appeal denied, 71 Ill.2d 607 (1978); *State Bk. of Lombard* v. *Segovia*, 49 Ill.App.3d 682, 685, 7 Ill.Dec. 527, 529, 364 N.E.2d 688, 691 (1977); *County of Champaign* v. *Anthony*, 33 Ill.App.3d 466, 468, 337 N.E.2d 85, 89 (1975), affirmed without discussion of this point, 64 Ill.2d 532, 1 Ill.Dec. 373, 356 N.E.2d 561 (1976); *People* ex rel. *Hamer* v. *Bd. of Education*, 22 Ill.App.3d 130, 136, 316 N.E.2d 820, 826 (1974), appeal denied, 57 Ill.2d 609 (1975); *Delis* v. *Sepsis*, 9 Ill.App.3d 217, 222, 292 N.E.2d 138, 142–43 (1972), overruled on another point in *Costello* v. *Capital Cities Communications*, 125 Ill.2d 402, 415–16, 126 Ill.Dec. 919, 924–25, 532 N.E.2d 790, 796 (1988);

Zamouski v. *Gerrard*, 1 Ill.App.3d 890, 898, 275 N.E.2d 429, 434 (1971); *Richards* v. *Leimbacher*, 131 Ill.App.2d 775, 780, 267 N.E.2d 523, 526, appeal denied, 47 Ill.2d 592 (1971); *Bauscher* v. *City of Freeport*, 103 Ill.App.2d 372, 376, 243 N.E.2d 650, 652 (1968).

There is nothing to the contrary in any of the cases from this Court which Petitioner cites. In *First English I*, the Court specifically distinguished cases where takings claims had been dismissed for failure to withstand demurrer. 482 U.S., at 311, distinguishing *MacDonald*, *supra*, and *Agins*, *supra*. The remaining Supreme Court cases cited in the petition do not involve dismissals at the pleadings stage, *Lucas* v. *South Carolina Coastal Council*, 505 U.S. __, __, 112 S.Ct. 2886, 2890, 120 L.Ed.2d 798, 808–09 (1992); *Hodel* v. *Irving*, 481 U.S. 704, 710 (1987); *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 119–20, rehearing denied, 439 US. 883 (1978); *Armstrong* v. *United States*, 364 U.S. 40, 45, n. 3 (1960), and one of them actually held that there was *no* compensable taking. *Penn Central Transp. Co.*, *supra*, 438 U.S., at 138.

In sum, Petitioner's central thesis is directly contrary to well established case law emanating from this Court. It presents no unsettled federal question.

ii. *Dismissal On The Pleadings Has No Implications For Any Federal Right To A Jury Trial.*

Petitioner intimates that dismissal of his suit on the pleadings wrongly deprived him of his right to a jury trial on a takings claim. Pet. for Cert. 26. There are two reasons why this fails to present a federal question.

First, it has long been settled that the federal constitution grants no right to a jury trial in condemnation cases. *United States* v. *Reynolds*, 397 U.S. 14, 18 (1970); see also *Atlas Roofing Co.* v. *Occupational Safety Comm'n*, 430 U.S. 442, 458 (1977); *Dohany* v. *Rogers*, 281 U.S. 362, 369 (1930); *Crane* v. *Hahlo*, 258 U.S. 142, 147 (1922); *Backus* v. *Fort Street Union Depot Co.*, 169 U.S. 557, 569 (1898); *Bauman* v. *Ross*, 167 U.S. 548, 593 (1897); *Long Island Water Supply Co.* v. *Brooklyn*, 166 U.S. 685, 694–695 (1897); *Chicago, Burlington &c. R'd* v. *Chicago*, 166 U.S. 226, 244–45 (1897); *United States* v. *Jones*, 109 U.S. 513, 519 (1883).

Second, there is no infringement of any constitutional right to a jury trial where an insufficient or defective complaint is dismissed. *Belmar*, *supra*, 34 Ill.2d 544, 549, 216 N.E.2d 788, 792; *Harvey* v. *Brewer*, *supra*, 166 Ill.App.3d 253, 259, 116 Ill.Dec. 724, 728, 519 N.E.2d 939, 943; *Harvey* v. *Mackay*, *supra*, 109 Ill.App.3d 582, 589, 65 Ill.Dec. 167, 172, 440 N.E.2d 1022, 1027; *Delis*, *supra*, 9 Ill.App.3d 217, 222, 292 N.E.2d 138, 142–43.

iii. *Such Dismissal Does Not Offend The Due Process Clause.*

Petitioner seems to claim that dismissal of his suit on the pleadings improperly deprived him of his right to trial on the merits. Pet. for Cert. 23. If he is claiming a denial of some Fourteenth Amendment right, then he is mistaken. There is no infringement of any Due Process Clause right to trial where an insufficient or defective complaint is dismissed. *Harvey* v. *Mackay*, *supra*, 109 Ill.App.3d 582, 589, 65 Ill.Dec. 167, 172, 440 N.E.2d 1022, 1027; *Delis* v. *Sepsis*, *supra*, 9 Ill.App.3d 217, 222, 292 N.E.2d 138, 142–43.

b. *No Unsettled Federal Question Is Presented By The Rule Requiring Submission Of Proposed Amendments Prior To Oral Argument On Appeal.*

i. *The Petition Fails To Show That The Rule As Applied Offends The Takings Clause.*

Petitioner also criticizes the Court of Appeal's refusal to permit him to file a third amended complaint. Pet. for Cert. 16. It is unclear whether he contends that this infringes upon his rights under the Takings Clause.

If so, the petition fails to show any such infringement. That is because Petitioner never explains what amendments he would make to his pleading if given an opportunity to do so. It is thus impossible to determine whether a further amended pleading would show any violation of rights protected by the Takings Clause. Accordingly, the petition fails to make any showing that the Court of Appeal deprived Petitioner of rights under the Takings Clause by denying him leave to file yet another pleading. *Louis. & Nash. R. R.* v. *Higdon*, 234 U.S. 592, 596, 598–600 (1914); *Deasey* v. *City of Chicago*, *supra*, 412 Ill. 151, 156–57, 105 N.E.2d 727, 729–30.

ii. *It Is Settled That The Rule As Applied Does Not Offend The Due Process Clause.*

If Petitioner is claiming that the denial of leave to amend presents a federal question under the Due Process Clause, then he is wrong on that score as well.

Petitioner proceeds from the mistaken premise that the Court of Appeal denied him any opportunity to amend. Pet. for Cert. 16. That most assuredly was *not* the case.

The true facts are as follows: The trial court permitted Petitioner to file a total of three different pleadings during a period extending from 1988 through 1991. The Court of Appeal would have considered any additional proposed amendments, as long as Petitioner submitted them prior to oral argument on appeal, which took place in 1993. The Court of Appeal denied Petitioner further leave to amend *only when he failed to offer any proposed amendments in a timely fashion*. Pet. for Cert. 9–11, 16; App. to Pet. for Cert. 10–11, 12, 13–14.

On strikingly similar facts, this Court long ago held that such a denial of leave to amend is *not* inconsistent with the Fourteenth Amendment's Due Process Clause. *Roller* v. *Murray*, 234 U.S. 738, 745–46 (1914); accord, *Deasey* v. *City of Chicago*, *supra*, 412 Ill. 151, 156–57, 105 N.E.2d 727, 729–30. The Court of Appeal's denial of leave to amend thus raises no *unsettled* federal question vis-à-vis the Due Process Clause. Instead, the question has already been settled contrary to Petitioner's apparent contention.[1]

iii. *The Rule On Its Face Does Not Offend The Due Process Clause.*

The Court of Appeal employed the following rule of California appellate procedure in denying Petitioner leave to amend: To overturn a trial court ruling denying leave to

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[1] It is perhaps significant that Petitioner *never* submitted *any* proposed amendments to the Court of Appeal, *timely or otherwise*. Moreover, his certiorari petition contains none.

amend following the sustaining of a demurrer, the pleader must show abuse of discretion by explaining how his pleading can be successfully amended. Moreover, his explanation must come some time prior to oral argument on appeal. App. to Pet. for Cert. 10, 13,

This simple procedural rule is not inimical to the Due Process Clause. After all, as this Court held over 45 years ago, "Oral argument on appeal is not an essential ingredient of due process . . . ." *Price* v. *Johnston*, 334 U.S. 266, 286 (1948), criticized on another point in *McCleskey* v. *Zant*, 499 U.S. __, __, 111 S.Ct. 1454, 1464, 113 L.Ed.2d 517, 537, rehearing denied, __ U.S. __, 111 S.Ct. 2841, 115 L.Ed.2d 1010 (1991).

Consistent with that pronouncement, numerous lower courts have held that the Due Process Clause does *not* require oral argument on appeal. See, *e.g.*, *Magnesium Casting Co.* v. *Hoban*, 401 F.2d 516, 518 (CA1 1968), cert. denied, 393 U.S. 1065 (1969); *N. L. R. B.* v. *Local No. 42, Int. Ass'n of Heat & F. I. & A. Wkrs.*, 476 F.2d 265, 276 (CA3 1973) (op'n sur pet'n for rehearing in banc); *George W. B. Bryson & Co., Ltd.* v. *Norton Lilly & Co., Inc.*, 502 F.2d 1045, 1050 (CA5 1974); *Chamberlain* v. *Ericksen*, 744 F.2d 628, 630 (CA8 1984), cert. denied, 470 U.S. 1008 (1985); *Toquero* v. *I.N.S.*, 956 F.2d 193, 196, n. 45 (CA9 1992); *United States* v. *Marines*, 535 F.2d 552, 556 (CA10 1976); *Shaw* v. *Boney*, 695 F.2d 528, 531 (CA11 1983) (*per curiam*); *People* v. *Ashley*, 59 Cal.2d 339, 361, 29 Cal.Rptr. 16, 29, 379 P.2d 496, 509, cert. denied *sub nom. Ashley* v. *California*, 374 U.S. 819 (1963); *Bentley* v. *State*, 415 So.2d 849, 850 (Fla.App. 1982); *State* v. *Warner*, 594 So.2d 397, 402 (La.App. 1991); *In re: Carl G. Smith*, 145 Me. 174, 179, 74 A.2d

225, 228 (1950); *Ad + Soil, Inc.* v. *County Comm'rs*, 307 Md. 307, 318–19, 513 A.2d 893, 899 (1986); *Sabatinelli* v. *Travelers Ins. Co.*, 369 Mass. 674, 677–78, 341 N.E.2d 910, 911 (1976); *Moore* v. *Spangler*, 401 Mich. 360, 369–70, 258 N.W.2d 34, 37–38 (1977); *State* v. *Smith*, 199 Neb. 368, 373, 259 N.W.2d 16, 18 (1977); *State* v. *Lewis*, 104 N.M. 218, 220–21, 719 P.2d 445, 447–48 (App. 1986); *State* ex rel. *Reed* v. *Schwab*, 287 Ore. 411, 414–16, 600 P.2d 387, 390, 24 A.L.R.4th 422, 425–27 (1979), cert. denied *sub nom. Reed* v. *Schwab*, 444 U.S. 1088, rehearing denied, 445 U.S. 955 (1980); *Webb* v. *State*, 533 S.W.2d 780, 784–85 (Tex.Crim. 1976); *State* v. *Smith*, 139 Vt. 653, 427 A.2d 383 (1981).

It unavoidably follows that California courts do *not* run afoul of the Due Process Clause by requiring appellants to submit proposed pleading amendments prior to oral argument. Petitioner's facial challenge to that requirement raises no federal question regarding the Due Process Clause.

c. *No Federal Question Is Presented By The Rule Requiring A Pleader To Explain Allegations In Amended Pleadings That Contradict Admissions In Prior Pleadings.*

i. *The Rule Is A State Law Matter Over Which This Court Has No Jurisdiction.*

Petitioner seems to contend that the Court of Appeal erred by disregarding one of the allegations in his second amended complaint. In that allegation, Petitioner pleaded that Respondents had officially closed and abandoned Gardner Avenue, which is a street adjoining his property. Pet. for Cert. 16, 20–21, 22.

The Court of Appeal disregarded that allegation only because it was an obvious sham. It directly contradicted a fatal admission contained in both Petitioner's original and first amended pleadings.

To be specific, both those prior pleadings explicitly alleged that Respondents had taken " . . . no action to officially close Gardner Avenue, which is still a public street which fronts the subject property . . . ." In his original pleading, Petitioner even affirmed the truth of that allegation under penalty of perjury. Pet. for Cert. 7–8, 17–18; App. to Pet. for Cert. 11–12, text & n. 2.

In opting to disregard the contradictory allegation in Petitioner's second amended complaint, the Court of Appeal relied on an elementary rule of California pleading practice: Where a verified complaint contains allegations destructive of a cause of action, the defect cannot be cured in subsequently filed pleadings by simply omitting the allegations without explanation. App. to Pet. for Cert. 11–12. Petitioner's objection to the Court of Appeal's application of this California pleading principle does *not* raise a federal question appropriate for review by this Court. *Agins* v. *Tiburon*, *supra*, 447 U.S. 255, 259–60, n. 6; cf. *MacDonald, Sommer & Frates* v. *Yolo County*, *supra*, 477 U.S. 340, 352, n. 8, ¶ 1.

ii. *In Any Event, The Petition's So-Called "Explanation" Is Tardy And Inadequate.*

On page 22 of his petition, Petitioner claims to explain the inconsistency in his allegations. His explanation comes too late: It should have been presented in the state courts.

Moreover, the so-called "explanation" does nothing to resolve Petitioner's inconsistency in pleading. In his first two pleadings, Petitioner alleged that Gardner Avenue had *not* been closed. In his second amended complaint, he alleged that Gardner Avenue *was* officially closed and abandoned. Pet. for Cert. 7–8, 17–18; App. to Pet. for Cert., 11–12, text & n. 2.

Petitioner's purported "explanation" is that Gardner Avenue was opened to every member of the public as a street except for him. Pet. for Cert. 22. This obviously does *not* explain the allegation in Petitioner's second amended complaint, though. Instead, *it actually confesses the allegation's falsity*. If anything, this shows the wisdom behind the California pleading rule which led the Court of Appeal to ignore the contradictory allegations in Petitioner's second amended complaint.[2]

C. *The Dismissal Of Petitioner's Suit Implicates No Decisional Conflict Between California And Other Jurisdictions.*

Petitioner also seems to argue that a conflict of authority exists between California and other jurisdictions with respect to takings jurisprudence. As explained below, no such conflict exists, much less one that can be resolved by granting certiorari in the instant case.

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[2] Not unsurprisingly, Petitioner's "explanation" is itself far-fetched. As Respondents understand it, Petitioner is claiming that Gardner Avenue is open as a street to every member of the public except for him. Pet. for Cert. 22. Petitioner cannot seriously suggest that Respondents have set up full-time roadblocks on Gardner Avenue to prevent him and him alone from passing.

1. *There Is No Conflict Between California And South Carolina.*

a. *Both States Employ The Same Rules Of Pleading.*

Petitioner seems to imply that South Carolina state courts treat inverse condemnation suits more favorably than California courts treated his suit. Pet. for Cert. 15, n. 16, 24, n. 17. He is wrong. South Carolina courts employ the same pleading rules which California used in the instant case.

For example, South Carolina courts, like their California counterparts, have not hesitated when appropriate to dismiss inverse condemnation suits via demurrer at the pleadings stage. See, *e.g.*, *Brabham* v. *City of Sumter*, 275 S.C. 597, 274 S.E.2d 297 (1981); *Brown* v. *School Dist. of Greenville Cty.*, 251 S.C. 220, 225, 161 S.E.2d 815, 817 (1968); *Gasque* v. *Town of Conway*, 194 S.C. 15, 18–25, 8 S.E.2d 871, 872–75 (1940), overruled on another point in *McCall* v. *Batson*, 285 S.C. 243, 249, 329 S.E.2d 741, 744 (1985); *McGann* v. *Mungo*, 287 S.C. 561, 571–73, 340 S.E.2d 154, 159–60 (App. 1986). Also, appellate courts in South Carolina, like those in California, require an appellant to show abuse of discretion before they will reverse a trial court's refusal to permit amendment after sustaining a demurrer to a defective pleading. *Vaughan* v. *Kalvas*, 288 S.C. 358, 362–63, 342 S.E.2d 617, 619–20 (App. 1986). And South Carolina joins California in frowning on pleadings amendments which seek to cure fatal defects by directly contradicting prior allegations that defeated the plaintiff's cause of action. *Whaley* v. *Lawton*, 57 S.C. 256, 264–67, 35 S.E. 558, 561–62 (1900); *Coker* v. *Monaghan Mills*, 119 F. 706, 708–09 (C.C.S.C. 1902).

(Although some of the foregoing cases were decided prior to a mid-1985 recodification of South Carolina's pleading rules, they remain good authority, inasmuch as one of the new rules replaced and performs the same function as the old pleading rules regarding demurrers. *Brown* v. *Leverette*, 291 S.C. 364, 366, 353 S.E.2d 697, 698 (1987); *New Hanover County D.S.S.* v. *Gore*, 288 S.C. 138, 139, n. 1, 341 S.E.2d 631, 632, n. 1 (1986); *McGann* v. *Mungo*, *supra*, 287 S.C., at 571, n. 1, 340 S.E.2d, at 159.)

b. *There Is No Conflict In The Treatment Given On Remand To The* First English *And* Lucas *Cases.*

As "evidence" of a supposed takings jurisprudence conflict between California and South Carolina, Petitioner points to the contrasting results which state court remands yielded in the *First English* and *Lucas* cases. Pet. for Cert. 15, n. 16, 24, n. 17. Petitioner's analysis is faulty, however. The differing results were the product of factual and procedural distinctions between the two cases, *not* the product of disparate legal standards between the two states.

Lucas v. *South Carolina Coastal Council*, *supra*, 505 U.S. __, 112 S.Ct. 2886, 120 L.Ed.2d 798, reached this Court following a bench trial. The trial court had found that the subject land use regulation rendered the plaintiff's land valueless, since it deprived him of any reasonable economic use of his property. This Court held that such a finding required the state to pay just compensation for a taking, unless the regulation could be sustained on the basis of principles of state property and nuisance law. The Court remanded the case to South Carolina to determine whether such state law principles authorized the regulation in question.

505 U.S., at __. __, __, __, 112 S.Ct., at 2889–90, 2892, 2896, 2899–2902, 120 L.Ed.2d, at 807–09, 811, 815–16, 820–23.

This highly limited remand posed little difficulty for the South Carolina Supreme Court. It was unable to identify any common-law basis for upholding the pertinent regulation. It accordingly remanded the case for a trial to determine the amount of damages. *Lucas* v. *South Carolina Coastal Council*, 424 S.E.2d 484, 486 (S.C. 1992).

In stark contrast, *First English I* came before this Court on the pleadings. At that stage, the California courts had yet to consider whether the subject regulation actually denied the landowner all use of his land. This Court therefore remanded *First English* for determination of that issue, and for a determination as to whether the regulation could be upheld on state common-law principles. *First English I*, *supra*, 482 U.S. 304, 308–13, 321–22.

On remand, the California Court of Appeal closely scrutinized the challenged regulation, as well as a variety of related county ordinances affecting the landowner's property. The Court of Appeal held that the subject regulation did not effect an uncompensated taking, because (1) it did *not* deny the landowner all use of its property, (2) it was justifiable as a temporary moratorium, and (3) its enactment was motivated by compelling public safety concerns. *First English II*, *supra*, 210 Cal.App.3d 1353, 1356, 1365–74, 258 Cal.Rptr. 893, 894, 901–07.

Significantly, the regulation challenged in *First English* was promulgated for the specific purpose of preventing human death and injury. *Id.*, at 1370, 258 Cal.Rptr., at

904. No remotely comparable concern was connected to the land use regulation struck down in *Lucas*. See 503 U.S., at __-__, text & nn. 10–11, 112 S.Ct., at 2896–98, text & nn. 10–11, 120 L.Ed.2d, at 816–19, text & nn. 10–11.

In sum, California and South Carolina courts reached differing results in the *First English* and *Lucas* remands due to marked differences between the cases' challenged regulations and procedural postures. The contrasting dispositions do *not* evidence any conflict in authority between the two states.

2. *There Is No Conflict Between California And The Ninth Circuit.*

a. *Both Jurisdictions Rely On The Same Federal Precedents.*

Petitioner next implies that a conflict of authority exists, with respect to takings cases, between the California state court system and the Ninth Circuit Court of Appeals. Pet. for Cert. 25, n. 18. Not so. California takings jurisprudence often relies on federal precedent. *Gilbert* v. *State of California*, 218 Cal.App.3d 234, 253–54, 266 Cal.Rptr. 891, 902–03 (1990). Obviously that is the same body of law which guides the Ninth Circuit.

b. *The Dismissal Of Petitioner's Suit Does Not Conflict With The* Golden Gate *Decision.*

Petitioner seems to believe that the disposition of his case is inconsistent with a Ninth Circuit *district court* decision in a case entitled *Golden Gate Hotel Assn.* v. *City and County of San Francisco*. Pet. for Cert. 27, text & n. 20. Petitioner once again is mistaken.

Although the *Golden Gate* opinion is evidently unpublished, an account of it appears on pages 25 through 28 of the petition. Apparently it involves a challenge to an ordinance which severely restricts the ability of residential hotel owners to convert their property to other uses.

That stands in marked contrast to the regulation Petitioner has attacked in the instant case. Respondents' redevelopment plan neither restricts, diminishes nor in any way limits the uses which Petitioner can lawfully make of his land. App. to Pet. for Cert. 101–11.

The present case and *Golden Gate* are thus readily distinguishable, rather than in conflict. In any event, this Court ordinarily grants certiorari to resolve a conflict between a state court *of last resort* and a federal court *of appeals*, *not* between an *intermediate* state appellate court and a federal *district* court. U.S.Sup.Ct. Rule 10.1(b).

3. *Because No Interjurisdictional Conflict Exists, The Petition Fails To Present Any Equal Protection Questions.*

Petitioner seems to assert that a conflict of inverse condemnation case law between jurisdictions would both violate the Equal Protection Clause and lead to undesirable forum shopping. Pet. for Cert. 24–25, text & nn. 17–18. The instant case fails to present these questions, however. That is because, as noted on pages 23–28 of this brief, the petition fails to show any conflict of authority among lower courts, much less a conflict that can be resolved by granting certiorari in this case.

III. *Certiorari Is Inappropriate, Because The Trial Court's Order Can Be Sustained On Independent State Grounds.*

Review by this Court would be inappropriate even if the petition did present a federal question. That is because the trial court order dismissing Petitioner's suit can be sustained on independent state grounds.

As Petitioner correctly notes, the trial court did *not* rely solely on his failure to plead a cause of action when it dismissed his suit. It also relied on state law precepts such as (1) the statute of limitations, (2) the doctrine of exhaustion of administrative remedies, and (3) principles of res judicata. The Court of Appeal's opinion, on the other hand, fails to address the applicability of any of those state law grounds. Pet. for Cert. 12–13.

This Court should therefore decline review even if it does conclude that the petition raises a significant federal question. Instead, the Court should remand the case to the Court of Appeal to determine whether Petitioner preserved the right to challenge the trial court's application of the various state doctrines and, if so, whether those doctrines provide a state law bar to Petitioner's suit independent of any federal questions. *Paschall* v. *Christie-Stewart, Inc.*, 414 U.S. 100, 100–02 (1973) (*per curiam*), rehearing denied, 414 U.S. 1138 (1974).

CLOSING ARGUMENT

The dismissal of Petitioner's suit does not share the constitutional vice that necessitated reversal in *First English I*. Petitioner's suit was not dismissed in an erroneous belief that temporary takings are *per se* noncompensable.

Instead, his case was dismissed because California courts determined that Respondents' regulation did *not* deprive him of substantially all use of his property. The California courts made this determination after giving Petitioner *four* opportunities during a *five-year* period to plead or state facts showing such a deprivation. *Six* California judges scrutinized Petitioner's pleadings for such facts, and they *unanimously* agreed that there were none.

In examining Petitioner's pleadings, California courts applied common sense rules of pleading that are employed in other jurisdictions as well. It is already settled that those pleading rules are entirely permissible under the Fifth and Fourteenth Amendments.

The plain truth is that Petitioner's case presents no unsettled federal question. Nothing in the constitution requires subjecting this protracted and meritless litigation to further judicial scrutiny.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

DATED: December 17, 1993

Respectfully submitted,

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